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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANA B. HELLINGS,
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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Marlin-Rockwell Corporation respectively shows to this Honorable Court:

A. Summary Statement of Matter Involved.

This cause arises out of alleged unfair labor practices of the petitioner in refusing to bargain collectively with International Union, United Automobile Workers of America, Local No. 338 (C. I. O.) (hereinafter referred to as the Union), and in terminating the employment of certain employees allegedly because of membership or activity in the Union.

A dispute having arisen concerning the right of the Union to represent all of petitioner's employees for purposes of collective bargaining, a consent election was held on August

21, 1937. For said election, representatives of the Union, petitioner and the National Labor Relations Board (hereinafter referred to as the Board) agreed upon the appropriate unit, and the procedure to be followed, and prepared lists of the employees who should be eligible and ineligible, respectively, to vote (R. 20, 32, 247-250).

The outcome of this election was as follows (Bd. Ex. 13, Case No. III-R-42, R. 14-15-22; Res. Ex. 2, Case No. C-967, R. 14-15, 250-252):

Total number eligible to vote	429
Total number of ballots counted	334
Total number of votes in favor of Union	202
Total number of votes against Union	129
Total number of void ballots	3

Thus, the Union, although it received a majority of the ballots counted, did not receive the affirmative designation of a majority of the employees eligible to vote. For this reason petitioner refused to recognize the Union as the representative of all its employees for purposes of collective bargaining. The Board, in the proceedings based on this consent election was evidently unwilling to hold that a majority of votes cast, when less than a majority of the employees eligible, was a sufficient designation, for in its Decision (Bd. Ex. 1-A, Case No. R-342, R. 38-47, 61) it refused to certify the Union and ordered a new election to be held.

At the election held February 24, 1938, purportedly pursuant to said Direction of the Board in said proceedings, petitioner requested permission to have a representative present, but such permission was denied (Bd. Exs. 1-B, 1-D and 1-E, Case No. R-342, R. 48-49, 52-55, 62, 74-76, 257-258). According to the Intermediate Report of the Regional Di-

rector, the result of said election was as follows (Bd. Ex. 1-F, Case No. R-342, R. 55-57, 62):

Total number eligible to vote	407
Total number of ballots counted	330
Ballots in favor of Union	175
Ballots against the Union	155
Void ballots	2
Challenged ballots	9

Petitioner duly served its Exceptions (Bd. Ex. 1-H, Case No. R-342, R. 57-59, 63) to the Regional Director's Intermediate Report of said election, objecting thereto on the grounds (1) that the number of votes reported cast for the Union did not constitute a majority of those deemed eligible to vote, (2) that various individuals not in petitioner's employ at the time of the election had been considered eligible and allowed to vote, (3) that petitioner's motion to have a representative present at said election had been denied, and (4) that the election and the Intermediate Report and the findings and recommendations therein were illegal, invalid and not binding upon petitioner. A hearing upon said Exceptions was held on April 4, 1938, at which testimony and exhibits were introduced in evidence and stenographic minutes were kept. The Trial Examiner made a written report, but petitioner notwithstanding its request (Bd. Ex. 1, Sched. "C", Case No. III-C-165, R. 160, 170-171), was denied a copy thereof (Bd. Ex. 1, Sched. "D" and "E", Case No. III-C-165, R. 160-162, 170-171) and was thereby deprived of the opportunity of examining the same and excepting thereto.

On the basis of this proceeding the Board issued a Certification of Representatives (Res. Ex. 4, Case No. C-967, R. 128-133, 258) certifying the Union as the exclusive representative of all of petitioner's employees in the unit.

On September 11, 1938, a Complaint (Bd. Ex. 1, Case No. III-C-165, R. 136-141, 170-171) was served upon petitioner charging petitioner with unfair labor practices in that it:

(a) Refused to bargain collectively with the Union as the sole duly designated representative of petitioner's eligible employees in the appropriate unit.

(b) Discriminatorily terminated the employment of ten named employees, including Francis B. Winans and Herbert S. Anderson, because of membership or activity in the Union, and

(c) Interfered with, restrained and coerced its employees in the exercise of their rights by the above acts and by other acts.

Petitioner duly served its Answer (Bd. Ex. 1, Case No. III-C-165, R. 141-162, 170-171) denying the allegations of said Complaint, and alleging that the employees named therein were discharged for valid business reasons; and on August 25, 26, 29 and 30, 1938, a hearing was held at Jamestown, N. Y., before a trial examiner duly designated by the Board. At this hearing it was expressly agreed by all parties (R. 219) that the records in all prior Board proceedings involving petitioner should constitute part of the record in this case and might be referred to and considered in connection with any brief, argument or appeal.

From this hearing resulted the Trial Examiner's Intermediate Report (R. 426-448), petitioner's exceptions thereto (R. 448-475) and finally the Board's Decision and Order (R. 475-504). By said Decision, the Board dismissed all allegations of discriminatory discharge except two, Winans and Anderson, but found petitioner guilty of the other unfair labor practices charged. The Order contained the usual cease and desist provisions and affirmatively

directed petitioner to bargain with the Union, to reinstate Winans and Anderson with back pay, and to post notices.

Petitioner duly petitioned the Circuit Court of Appeals for the Second Circuit (R. I) to review and set aside the said Decision and Order of the Board. In its answer (R. VI) to said petition the Board requested enforcement of its said Order. After oral argument and the submission of briefs by both parties, the Circuit Court of Appeals for the Second Circuit rendered its opinion (116 F. (2d) 586-589, R. 513) modifying the Board's Order in regard to posting notices and payments to public relief agencies and, as modified, affirming the said Order.

Two matters are involved herein: (1) the conduct and result of the election held by the Board on February 24, 1938, to determine whether or not the Union should represent all of petitioner's employees in the appropriate unit for purposes of collective bargaining and (2) the existence of any substantial evidence to show that the discharges of Winans and Anderson were discriminatory.

The certification (Res. Ex. 4, Case No. III-C-165, R. 128-133, 258) of the Union as such bargaining representative and the guilt of petitioner in refusing to bargain with the Union are based entirely upon the said election (R. 484, 486). In the said election the Union received a slender majority of the votes cast, but less than a majority of the employees determined by the Board to be eligible to vote (Bd. Ex. 1-F, Case No. R-342, R. 55-57, 62). An important question of statutory construction is therefore raised, namely, whether a Union which receives a majority of the votes cast, but not the affirmative vote of a majority of the employees in the appropriate unit, is entitled to act as the exclusive representative of all employees in the unit for purposes of collective bargaining, under Section 9 (a) of

the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A., § 159) which provides:

> "Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *."

Prior to the election of February 24, 1938, petitioner duly requested permission to have a representative present at said election (Bd. Ex. 1-B and 1-D, Case No. R-342, R. 48-49, 52-54, 62, 74-76, 257-258) for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible and of determining whether or not said election was conducted in accordance with the Board's Direction of Election. Such permission was unconditionally refused by the Board (Bd. Ex. 1-E, Case No. R-342, R. 54-55, 62). Granting that petitioner did not have an absolute right to such representation, the question remains whether, under the facts of this case, the denial of such representation was not so arbitrary as to constitute an abuse of the Board's discretion.

The final and most important question in regard to said election concerns the eligibility of certain persons to vote therein. Under the Board's Direction of Election (Bd. Ex. 1-A, Case No. R-342, R. 38-47, 61), eligibility was based upon the petitioner's payroll of September 24, 1937—five months prior to the election. During the intervening period, petitioner's business suffered a very serious decline (see Res. Ex. 9, Case No. III-C-165, R. 166-167, 271-272), and a large reduction in the working force became necessary. During this time 174 employees were discharged by petitioner because of lack of work (Res. Ex. 4, Case No. R-342, Res. Ex. 10 and 11, Case No. III-C-165, R. 60, 65, 66-67,

167, 168-169, 273-276). These discharges were final, and there were no commitments of any kind to reemploy any of these persons at any time or under any circumstances (R. 70-73, 76-93). Nevertheless these persons were permitted to vote and 114 of them did vote in the election (Res. Ex. 4, Case No. R-342, R. 60, 65). Since the final vote, according to the Board's figures (Bd. Ex. 1-F, Case No. R-342, R. 55, 62, 129) was 175 to 155, it is obvious that these 114 votes had a decisive effect upon the result. A very serious question is therefore presented whether these former employees should have been permitted to vote, and whether their participation did not void the election.

The other branch of the case concerns the existence of substantial evidence to support the finding of discrimination in the discharges of Winans and Anderson. In the other eight cases of alleged discrimination, one was dismissed without any proof whatever, and the Board correctly found as to the other seven that the discharges were for valid business reasons, not because of Union membership or activity (R. 490-494). The proof as to Winans and Anderson was substantially identical with that in the other seven cases, yet the Board found discrimination without, as petitioner contends, any substantial evidence to support such finding, and the Circuit Court of Appeals affirmed such finding with extremely scant consideration (116 F. (2d) 586, 589, R. 517).

B. Jurisdiction.

This Court has jurisdiction to review the order of the Circuit Court of Appeals. Section 10 (e) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 160 (e)) provides in part:

> "The jurisdiction of the (Circuit) Court shall be final, except that the same shall be subject to review

> * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended."

Section 240 of the Judicial Code, as amended, (43 Stat. 938, 28 U. S. C. A. § 347) provides in part:

> "In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Section 350 of title 28 of the United States Code (43 Stat. 940, 28 U. S. C. A. § 350) provides in part:

> "No writ of error, appeal, or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *"

The decree herein in the Circuit Court of Appeals for the Second Circuit was entered on February 8, 1941. This petition for writ of certiorari is filed on May 8, 1941.

C. The Questions Presented.

The questions presented upon this petition, which are more fully discussed above and in the brief accompanying this petition, may be stated as follows:

1. Whether, under Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) a Union which has received a majority of the votes cast in an election, but not the affirmative vote of a majority of the em-

ployees in the appropriate unit, is entitled to act as the exclusive bargaining agent of all such employees.

2. Whether, under the facts of this case, it was an abuse of the Board's discretion to refuse to permit petitioner to have a representative present at the election for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible, and of determining whether or not said election was conducted according to the Direction of Election.

3. Whether persons who have been discharged for a valid business reason and whom the employer is under no commitment or duty to rehire are eligible to vote in an election to determine the bargaining representative for said employer's employees.

4. Whether the record contains any substantial evidence showing that petitioner discriminatorily discharged Francis B. Winans and Herbert S. Anderson because of Union membership or activity.

D. Reasons Relied On for the Allowance of the Writ.

1. The Board and Circuit Court of Appeals held that the Union was entitled to act as bargaining representative for all of petitioner's employees although it received the vote of a majority of those participating in the election but not the affirmative vote of a majority of the employees in the appropriate unit. This involves a highly important question of the construction of Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) which has not been, but should be settled by this Court. The court below admitted (116 F. (2d) 586, 588, R. 517) that said section, when read literally, seemed to require the construction urged by petitioner. It is of the greatest importance to the Board in its enforcement of said Act and to a great number of employers and employees throughout the

country who are subject thereto that this question should be determined by this Court.

2. The court below held that the Board did not exceed its discretion in refusing to allow any representative of petitioner to be present at the election of February 24, 1938. In order to secure fair play at such elections and the consequent acceptance of the results thereof by all parties concerned, it is necessary to keep administrative discretion in such matters within proper bounds. This Court should, therefore, review and determine the question of whether or not such discretion properly goes to the extent of totally prohibiting one of the most vitally interested parties from having any representation or means of checking the conduct of the choice of bargaining representatives by its employees.

3. The court below further held that persons who had been discharged and whom petitioner was under no commitment or duty to rehire were eligible to participate in the choice of bargaining representatives. This question involves an extremely important question of Federal law which has not been, but should be settled by this Court, namely the construction of the word "employee" as used in sections 2 (3), 9 (a) and 9 (c) of the National Labor Relations Act (49 Stat. 450, 453, 29 U. S. C. A. §§ 152 (3), 159 (a) and 159 (c)). The question is of the greatest importance to all employers and employees subject to the Act, particularly those engaged in businesses which have a large labor turn-over, and must eventually be settled by this Court.

4. The final question concerns the quantum of evidence necessary to support a finding of discriminatory discharge. While the National Labor Relations Act, section 10 (f) (49 Stat. 453, 29 U. S. C. A. § 160 (f)) provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," this Court has held in *Consolidated Edison*

Company of New York, Inc., v. *National Labor Relations Board*, 305 U. S. 197, 229, 59 S. Ct. 206, 216-217, that such evidence must be substantial and more than a mere scintilla. The court below, in upholding the Board's finding of discrimination in this case has entirely departed from the rule announced by this Court and has accepted the Board's findings even though not supported by any substantial evidence.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9, *Marlin-Rockwell Corporation*, Petitioner v. *National Labor Relations Board*, Respondent"; and that said judgment of the said United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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